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Protection of human rights and fundamental freedoms while countering terrorism

Report of the Secretary-General**

Summary

The present report is submitted pursuant to General Assembly resolution 57/219, "Protection of human rights and fundamental freedoms while countering terrorism". It begins with a review of comments received from Governments and international and non-governmental organizations in response to a letter from the United Nations High Commissioner for Human Rights seeking views and information on the protection of human rights while countering terrorism. The report then provides an overview of rights that have come under significant pressure worldwide as a result of counter-terrorism measures, including the rights to life and to freedom from torture, due process rights and the right to seek asylum. The report concludes with a number of general observations.

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** The present report was delayed in order to incorporate as much information from Governments as possible.

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I. Introduction

1. In its resolution 57/219 of 18 December 2002, "Protection of human rights and fundamental freedoms while countering terrorism", the General Assembly affirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law; encouraged States, while countering terrorism, to take into account relevant United Nations resolutions and decisions on human rights; and further encouraged them to consider the recommendations of the special procedures and mechanisms of the Commission on Human Rights and the relevant comments and views of United Nations human rights treaty bodies.

2. Also in its resolution 57/219, the General Assembly requested the United Nations High Commissioner for Human Rights, making use of existing mechanisms:

(a) To examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources;

(b) To make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism;

(c) To provide assistance and advice to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies.

3. The General Assembly requested the Secretary-General to submit a report on the implementation of the resolution to the Commission on Human Rights at its fifty-ninth session and to the Assembly at its fifty-eighth session. The present report begins with a review of comments received from Governments and international and non-governmental organizations in response to a letter from the United Nations High Commissioner for Human Rights seeking views and information on the protection of human rights while countering terrorism. The report then provides an overview of areas of concern with respect to the obligation of States to protect human rights while countering terrorism, and concludes with a number of general observations.

II. Actions and views of States

4. On 14 March 2003, the United Nations High Commissioner for Human Rights sent a letter to all Member States, followed by letters to international and non-governmental organizations, seeking views and information relevant to the question of the protection of human rights while countering terrorism. The following responses were received.

5. Colombia referred to an earlier communication it had sent to the Special Rapporteur on terrorism and human rights of the Subcommission on the Protection and Promotion of Human Rights. In that letter, dated 6 March 2003, Colombia characterized terrorism as one of the most worrying threats to international security and considered it imperative to apply the principle of shared responsibility, in the form of mechanisms of cooperation and mutual assistance, as the basis of the international strategy to confront the threat. The Government said that action against

terrorism must conform to existing norms, the principles of the Charter of the United Nations and the Charter of the Organization of American States (OAS), and the principles and values inherent in the rule of law, in particular international and regional human rights norms. It considered it necessary to reach an appropriate balance between the requirement of providing security and protection, on the one hand, and the legal and moral imperative of respecting in all cases the rights and guarantees enjoyed by all. The Government underlined the importance of international cooperation, and noted that it should focus on strengthening intelligence activities and judicial processes that deal with international offences such as terrorism.

6. Costa Rica reiterated its vehement condemnation of terrorism in all its forms, while also stressing the vital importance of conducting the fight against terrorism in strict conformity with international law, and particularly with human rights. Its commitment to peaceful conflict resolution has led it to take initiatives that clearly demonstrate its pacifist position. On terrorism, Costa Rica has firmly supported the need for joint action and coordination among States, while recognizing that each State bears an important responsibility with respect to its own inhabitants, with special attention needing to be paid to persons and groups working in favour of human rights. The integration of these two approaches serves to strengthen the vision of democracy and social justice to which all States Members of the United Nations aspire, and permits international security to be seen as a delicate concept in which social and economic stability plays a major role. Costa Rica noted that it has expressed its condemnation of terrorism and has urged strong action, with strict respect for human rights, at numerous international and regional meetings, has ratified a number of relevant international instruments and has taken concrete action at the national level to confront terrorism.

7. The Czech Republic stated that its participation in the international fight against terrorism is carried out in accordance with its human rights obligations under the international human rights treaties to which it is a party. It summarized rules in the area of criminal law that it considers especially relevant to this issue. In particular, it noted that in matters of extradition, cases must meet certain strict criteria. The principle that the Czech Republic does not extradite its own citizens does not apply in connection with its commitments vis-à-vis international tribunals. The Czech Republic will not extradite a person to a country where he/she would face torture or capital punishment. Regarding the right to privacy, the Czech Republic noted that phone tapping is permitted only in the context of prosecution of an especially grave crime, and only upon court order. The same protection applies to written correspondence. In neither case may the State obtain access to communications between an accused and his lawyer.

8. Finland stressed that terrorism threatens the implementation of human rights, democracy and rule of law, as well as internal and international peace and security. It underlined the importance of international cooperation and collective action as well as respect for human rights and the rule of law in the fight against terrorism. Finland noted that it has ratified the 12 United Nations instruments on aspects of terrorism and the 1977 European Convention for the Suppression of Terrorism and has enacted a broad range of domestic measures. It is duly implementing relevant Security Council resolutions. The Government stated that the promotion of human rights is a fundamental element of its foreign and security policy, and the Finnish Constitution provides that everyone has the right to life, personal liberty, integrity

and security. Under the Constitution, the Parliamentary Ombudsman monitors the implementation of basic rights and liberties, including the implementation of legislation regarding terrorist acts.

9. Germany stated that the fight against terrorism is one of the highest priorities of its foreign policy. The Government has taken various measures to fulfil its international obligations and to contribute to the international war on terrorism with full respect for human rights. German foreign policy is based on the conviction that the fight against terrorism must always be legitimized under international law. Human rights, in particular, must not be violated, since the fight is not only about defending the security of the population, but also about fundamental values such as freedom, democracy and human rights. In accordance with the Constitution of Germany, European human rights norms take precedence over federal law, which ensures that they are respected in the context of counter-terrorism measures that are governed by domestic criminal law. For more information on the subject, the Government referred to the reports it has submitted to the Counter-Terrorism Committee of the Security Council.

10. Malta stated that while striking a balance between the need to protect society from the horrifying effects of terrorism and protecting the fundamental human rights of the individual is not an easy task, it is indispensable if the personal freedom that terrorism seeks to destroy is to be preserved. There is therefore a need for reflection on this issue with a view to articulating agreed guidelines to provide States with clear criteria and elements upon which to design counter-terrorism measures that do not overstep the bounds of what is necessary and lawful in the area of human rights protection. The Government noted that certain human rights instruments allow derogation by States in case of war or other public emergency, and suggested that it may be useful, in the interest of proportionality, to examine the inderogable core of human rights even where derogation may be allowed. In this respect, it noted the relevance of General Comment No. 29 of the United Nations Human Rights Committee on article 4 of the International Covenant on Civil and Political Rights.

11. Mexico emphasized that the obligation of States to combat terrorism and their duty to respect human rights and fundamental freedoms are not mutually exclusive, but rather complementary, since only a system that promotes democratic values, rule of law and protection of the human rights of all can guarantee effective action against terrorism. The fact that a State respects human rights inspires greater confidence in its investigations and judicial decisions, including those concerning persons suspected of terrorist acts. Mexico noted that counter-terrorist measures can be adopted during times of peace as well as during times of emergency or armed conflict, and said that while attention should be given first to the former, all three circumstances should be considered in order to establish a minimum standard of protection. It recommended that the Office of the United Nations High Commissioner for Human Rights, in preparing the present report, consider a number of key questions, including the vulnerability of certain groups (such as migrants, asylum-seekers and minorities) to counter-terrorism measures, adherence to the principle of legality, protection of the due-process rights of the accused, and non-derogable rights in states of emergency or armed conflict. Mexico further provided an overview of measures it has taken to promote respect for human rights by its security forces.

12. Sweden stated that it is working to ensure that efforts to combat terrorism are conducted in conformity with international public law, human rights and the rule of law. It noted that it has ratified all international criminal law conventions for the suppression of terrorism. It welcomed the efforts undertaken in the Counter-Terrorism Committee of the Security Council to promote international cooperation and assistance in the global effort against terrorism. Sweden noted that the Council's adoption of sanctions targeted at individuals and entities, rather than at States or Governments, has triggered an intense debate in Sweden. The country has therefore initiated a discussion with United Nations bodies and the European Union on ways to better safeguard the rights of the individual in such cases, while not compromising the need for swift action to counter terrorism. Sweden believes such issues are important because they may influence public opinion on the trustworthiness of the United Nations, as well as public support for the United Nations and continued efforts against terrorism. Sweden noted that in the framework of the legislative process of the European Union, due consideration is being given to human rights. The Government further referred to national legal safeguards to protect human rights while countering terrorism, noting that under the Constitution, no act of law or other provision may be adopted if it contravenes Sweden's commitments under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

13. Turkey stated that as one of the countries most affected by terrorism, it believes that States should take the necessary measures to prevent and eradicate this scourge. It believes that regional and international cooperation to this end is essential, and noted that it has become a party to all 12 United Nations conventions relating to terrorism. It recalled the difficulties encountered in identifying a universally accepted definition of terrorism, and noted that a comprehensive convention on terrorism would serve an important function for common understanding among States. Turkey further stated that terrorism is aimed at eradicating basic human rights while threatening the territorial integrity and security of States, and is by its very nature a violation of the right to freedom from fear affirmed in the preamble to the Universal Declaration of Human Rights, as well as of its article 3, which asserts the right of all to life, liberty and personal security. It said that the perception that human rights can be violated only by States is not in conformity with article 30 of the Declaration; terrorists, too, can violate human rights. The Government said that emphasis should continue to be placed on the responsibility of States supporting terrorism directly or indirectly, as well as the accountability of non-State actors. Turkey rejects the association of terrorism with any religion, ethnic identity, colour, race or particular geographical area. Finally, it noted the danger that terrorism might be somehow legitimized by arguments linking it to root causes in the social, economic or political conditions of a country, and said it strongly believes that terrorism, whatever its motives, cannot be tolerated.

14. Venezuela reiterated its condemnation of all acts, methods and practices of terrorism committed for whatever motive or objective. It said that such acts harm friendly relations among States, threaten international security and territorial integrity, and destabilize economic and social development. In analysing terrorism, either globally or with respect to specific themes such as human rights, it is essential to underline the lead responsibility of States in the investigation and punishment of terrorist activities. This is necessary so that the bounds of international law are not exceeded, since conferring direct responsibility on international organizations could

result in conflict with national legal orders. This has become evident in the Security Council's treatment of questions over which it lacks clearly defined competencies. Venezuela noted that it has ratified a number of United Nations and OAS instruments relating to terrorism and has signed or is studying several others.

15. The full texts of the replies received are available for consultation in the files of the Secretariat.

III. United Nations action

16. The relevance of human rights to the struggle against terrorism has been a major underlying theme of United Nations action. In remarks to the special meeting of the Counter-Terrorism Committee of the Security Council with international, regional, and subregional organizations, on 6 March 2003, the Secretary-General stated that as terrorism involves the calculated use of violence in violation of the law, the response to terrorism should aim to ensure the rule of law. He continued, "Terrorist acts, particularly those involving the loss of life, constitute grave violations of human rights. Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension."[1]

17. In follow-up to the report of the Secretary-General's Policy Working Group on the United Nations and Terrorism (A/57/273-S/2002/875, annex), the United Nations expects to publish in September 2003 a digest of jurisprudence of the United Nations and regional organizations, prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR), on the subject of human rights and counter-terrorism. Its aim is to assist policy makers and others in developing a vision of counter-terrorism strategies that are fully respectful of human rights. OHCHR has also continued its useful dialogue with the Counter-Terrorism Committee of the Security Council, and has made available to it guidance notes on compliance with international human rights standards for its examination of reports submitted in accordance with Security Council resolution 1373 (2001).[2]

18. United Nations human rights treaty bodies and special procedures continue to pay close attention to the issue of protecting human rights while countering terrorism. As will be seen below, they have issued wide-ranging formal observations and analysis on this issue. Between September 2001, when the Security Council adopted resolution 1373 (2001), and April 2003, for example, the United Nations Human Rights Committee examined the reports of 16 States parties to the International Covenant on Civil and Political Rights, in 7 of which it underlined concerns with respect to counter-terrorism measures. The Committee has often reiterated that States parties must ensure that measures taken to implement resolution 1373 (2001) fully respect the Covenant. An important initiative was the briefing of the Human Rights Committee by a senior staff member of the Counter-Terrorism Committee, in Geneva on 27 March 2003, followed by a briefing of the Counter-Terrorism Committee by the Vice-Chairperson of the Human Rights Committee in New York on 19 June 2003.

19. The United Nations special rapporteurs and representatives, independent experts and chairpersons of working groups, gathered at their annual meeting in

Geneva in June 2003, adopted a statement in which, while joining in the global condemnation of terrorism, they voiced profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which negatively affect the enjoyment of virtually all human rights: civil, cultural, economic, political and social. They drew attention to the danger inherent in indiscriminate use of the term "terrorism" and the resulting new categories of discrimination. They deplored the fact that, under the pretext of combating terrorism, human rights defenders are threatened, and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalization policies. They stated their commitment, within their respective mandates, to monitor developments, and called on all concerned parties, including the United Nations, to be vigilant to prevent any abuse of counter-terrorism measures.

20. The United Nations High Commissioner for Human Rights addressed the Counter-Terrorism Committee in October 2002, emphasizing his conviction that the best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law. He went on to say that we need to invest more vigorously in promoting the sanctity and worth of every human life; we need to show that we care about the security of all and not just a few; and we need to ensure that those who govern and those who are governed understand and appreciate that they must act within the law. OHCHR has notified the Counter-Terrorism Committee of the availability of its technical cooperation programme to assist States in the protection of human rights and fundamental freedoms while countering terrorism.

21. The Office of the United Nations High Commissioner for Refugees (UNHCR) has noted that security concerns since 11 September 2001 have dominated the debate on asylum and have at times overshadowed the legitimate protection interests of individuals. In a policy paper, UNHCR stated that while it endorses all efforts aimed at effectively combating terrorism, it remains concerned that, in the aftermath of 11 September 2001 bona fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or other measures and that carefully built refugee protection standards may be eroded. UNHCR has also recalled that in dealing with the terrorist threat in the context of asylum, the definition of refugees contained in the 1951 Convention relating to the Status of Refugees explicitly provides for the exclusion from refugee status of those who have committed serious crimes.[3]

IV. Actions of regional and non-governmental organizations

22. The following responses were received from regional and non-governmental organizations to the March 2003 letter of the United Nations High Commissioner for Human Rights, seeking views and information on the issue of protecting human rights while countering terrorism.

A. Regional organizations

23. The African Union provided the High Commissioner with a copy of the comprehensive report it had submitted to the Counter-Terrorism Committee special meeting with international, regional, and subregional organizations, held in New York in March 2003 (see S/AC.40/2003/SM.1/2 and Add.1 and Corr.1 and 2). The report notes, inter alia, the entry into force of the Organization of African Unity Convention on the Prevention and Combating of Terrorism (Algiers Convention) in December 2002. The Algiers Convention contains a provision, in article 22, that States must comply with the general principles of international law, in particular international humanitarian law, and the African Charter on Human and Peoples' Rights. The African Union also provided a copy of its Plan of Action, adopted at the African Union High-level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, held in Algiers in September 2002.

24. The Commonwealth of Independent States (CIS) noted that work has begun to facilitate accession by its member States to all relevant instruments of the United Nations and the Council of Europe on the issue of terrorism. CIS stated that it continues to pay close attention to the questions of human rights and fundamental freedoms in the international struggle against terrorism.

25. The Council of Europe recalled the issuance of its "Guidelines on human rights and the fight against terrorism", adopted by the Committee of Ministers on 11 July 2002. It also informed the High Commissioner of other initiatives, including the elaboration of a Protocol amending the European Convention for the Suppression of Terrorism. The Protocol, opened for signature in May 2003 and already signed by more than 30 States, inter alia, authorizes States to refuse extradition to countries where there is a risk of the death sentence being applied, or of an accused being subject to torture or life imprisonment without parole.

26. The European Commission provided the High Commissioner with a copy of its annual report on the situation of fundamental rights in the European Union, part of which addresses the balance between freedom and security in the response by the European Union and its member States to terrorist threats.

27. The Inter-American Commission on Human Rights (IACHR) published an important special "Report on terrorism and human rights" in October 2002, which offers a comprehensive overview and analysis of this question. In the report, IACHR formulates recommendations to OAS member States in order to guarantee that counter-terrorism measures conform with their international human rights obligations, international humanitarian law and refugee law.

28. The League of Arab States referred the High Commissioner to provisions of the Arab Convention for the Suppression of Terrorism, which entered into force in May 1999. In its preamble, the Convention proclaims the signatories' commitment to the highest moral and religious principles and, in particular, to the tenets of the Islamic Shariah, as well as to the humanitarian heritage of an Arab nation that rejects all forms of violence and terrorism and advocates the protection of human rights. It underlines the signatories' commitment to the Pact of the League of Arab States and the Charter of the United Nations, as well as all other international instruments to which they are parties. The League of Arab States said that several provisions of the Convention serve to protect human rights, including articles 1, 2, 4 and 6.

29. The Organization for Security and Cooperation in Europe (OSCE) informed the High Commissioner of a number of initiatives, including the adoption in December 2001 of the Bucharest Plan of Action, which aims to establish a framework for comprehensive OSCE action by participating States and OSCE as a whole to combat terrorism while fully respecting international law, including the international law of human rights and other relevant norms of international law. In December 2002, the Ministerial Council adopted the OSCE Charter on Preventing and Combating Terrorism. The OSCE Office for Democratic Institutions and Human Rights in Warsaw has appointed a coordinator on anti-terrorism issues, whose mandate includes analysing the human rights dimensions of anti-terrorism measures.

B. Non-governmental organizations

30. Amnesty International informed the High Commissioner that, since the adoption of General Assembly resolution 57/219, it has observed with deep concern that the international climate favouring counter-terrorism has caused many Governments to undermine the collective system of security that international human rights, humanitarian and refugee law represent. In communications with United Nations human rights bodies, Amnesty International has highlighted concerns about the negative impact of counter-terrorism measures on the protection and promotion of human rights in 34 countries. The areas of concern include allegations of arbitrary arrests, incommunicado detentions and deportation of foreign nationals. As part of its submission to the United Nations High Commissioner for Human Rights, Amnesty International provided 12 country-specific documents and reports on alleged human rights violations in the context of the fight against terrorism.

31. The Association pour la prévention de la torture (APT) provided the High Commissioner with a copy of a position paper on the issue, in which it underlined that any derogations from certain rights in the context of counter-terrorism measures are subject to strict limits, including those imposed by the principles of necessity and proportionality. APT underlined that certain rights are non-derogable under all circumstances, including the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

32. The Fédération internationale des ligues des droits de l'homme informed the High Commissioner of its commitment to providing his Office with all relevant information on the question of human rights and terrorism, and in that connection provided a copy of the annual report of the Observatoire pour la protection des défenseurs des droits de l'homme.

33. The International Service for Human Rights informed the High Commissioner of its active analysis of the issue, in particular with respect to the situation of human rights defenders worldwide. It provided the High Commissioner with statements and reports from three international meetings, held in 2002, that focused on the impact of counter-terrorism measures on human rights defenders.

V. Areas of concern in the protection of human rights while countering terrorism

34. United Nations human rights treaty bodies and special procedures, as well as regional bodies, have highlighted particular areas of concern that have come under pressure in the context of action against terrorism. These "pressure points" require special attention in order to ensure full respect for human rights in counter-terrorism efforts.

A. Right to life

35. The right to life is non-derogable under all circumstances, including states of emergency. It has been found to be especially relevant to efforts to apprehend suspected terrorists, as well as to proceedings that may result in the application of the death penalty. The United Nations Human Rights Committee has expressed concern, inter alia, over the use of weapons in combat situations linked to alleged terrorism, leading to large-scale loss of life.[4] Regarding the death penalty, in its General Comment No. 29, the Human Rights Committee has noted that due to the non-derogable nature of the right to life, any trial possibly leading to capital punishment (even during a state of emergency) must conform to the relevant provisions of the International Covenant on Civil and Political Rights, including its due-process and fair-trial provisions.[5]

B. Right to freedom from torture and cruel, inhuman or degrading treatment or punishment

36. The right to freedom from torture and cruel, inhuman or degrading treatment or punishment is non-derogable under all circumstances. The United Nations Committee against Torture has considered the use of torture or ill-treatment in counter-terrorism contexts and has emphasized that, notwithstanding the difficulties posed by the fight against terrorism, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."[6]

37. In his report to the United Nations Commission on Human Rights at its fifty-eighth session, in 2002, the Special Rapporteur on torture examined the non-derogability of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment and stressed that the legal and moral basis for the prohibition "is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies and practices".[7] Along the same lines, in his report to the General Assembly at its fifty-seventh session, the Special Rapporteur reviewed information he had received on counter-terrorism measures and expressed concern that "the provisions of some new anti-terrorist legislation at the national level may not provide sufficient legal safeguards as recognized by international human rights law in order to prevent human rights violations, in particular those safeguards preventing and prohibiting torture and other forms of ill-treatment".[8]

C. Conditions and treatment in detention

38. The Human Rights Committee has stated its view that, though not so specified in the Covenant on Civil and Political Rights, the right of persons in detention to be treated with humanity and with respect for the inherent dignity of the human person is non-derogable, placing an absolute obligation on States.[9] The Committee found this right to have been violated in case No. 577/1994, in which an accused terrorist (convicted after nine months) was held incommunicado, denied access to counsel for at least nine months after arrest and to his family for nearly two years, and was held in a state of isolation for 23 hours a day in a small cell, with no more than 10 minutes of sunlight a day.

D. Principle of legality

39. International jurisprudence has long emphasized the importance of the principle of legality (nullum crimen sine lege), according to which criminal conduct must be defined in law before an offence can be committed, and with sufficient precision so as to prevent arbitrary enforcement. The Human Rights Committee has expressed particular concern over counter-terrorism measures, including legal definitions of the offence of terrorism itself, which are framed so broadly as to violate the principle of legality. In one instance, the Committee stated that the definition of terrorism in national legislation was so broad as to encompass "a wide range of acts of differing gravity".[10]

E. Pre-trial detention

40. The issue of pre-trial detention has raised a number of concerns in the counter-terrorism context, including judicial supervision of such detention, the right to be free from torture, the right to be informed promptly of the reasons for arrest and the existence of any charges, and the prohibition against prolonged pre-trial detention. The Human Rights Committee has stated as a general principle its view that, in order to protect non-derogable rights, the right to take proceedings before a court to obtain a decision without delay on the lawfulness of detention must not be diminished, even when a State has derogated from certain provisions of the Covenant on the basis of a state of emergency.[11] In the case of so-called preventive detention, the Committee has stated that it must not be arbitrary, must be based on grounds and procedures established by law, information on the reasons for such detention must be given, and court control must be available, as well as compensation in the case of a breach.[12] It has concluded that violations of these principles occurred in several cases linked to counter-terrorism measures, particularly where pre-trial detention was prolonged.[13]

41. As a general principle, the Committee has stated that pre-trial detention "should be an exception and as short as possible".[14] Extended pre-trial detention has been said to be in effect a violation of the right to the presumption of innocence.[15] Concerns have also been raised over incommunicado pre-trial detention. The Human Rights Committee has observed that this may violate the right to freedom from torture and cruel, inhuman or degrading treatment, as well as due process rights provided for in articles 9 and 14 of the Covenant.[16]

F. Right to fair trial

42. The Human Rights Committee has highlighted various aspects of the right to fair trial in connection with terrorism prosecutions as matters of concern. It has stated its view that, though not mentioned as non-derogable in article 4 of the Covenant, certain elements of article 14 on due-process rights are obligatory for States, even under states of emergency. These include the presumption of innocence, as well as fundamental requirements of the right to fair trial inherent in the principles of legality and rule of law. It has emphasized that only a court of law may try and convict a person for a criminal offence.[17]

43. The Committee has expressed particular concern over the use of military and other special courts to prosecute terrorism-related offences. It has criticized trials conducted by the same military force that detained and charged the defendant, particularly where the members of the courts are active duty officers and there is no provision for sentences to be reviewed by a higher tribunal, stating that such shortcomings raise serious doubts about the independence and impartiality of military courts.[18] The Committee has urged that civilians be tried in all cases by ordinary civilian courts, and that laws or measures providing to the contrary be amended.[19] It has stressed the importance of the right of an accused to have any conviction and sentence reviewed by an independent higher tribunal according to law.[20]

G. Access to counsel

44. The Human Rights Committee has expressed concern over counter-terrorism measures permitting denial of access to counsel during the period immediately following arrest. It has stated, for example, in an instance in which access was denied for a period of 48 hours, that such measures require justification in view of the obligations imposed by articles 9 and 14 of the Covenant, particularly where less intrusive means exist for achieving the objectives intended to be served by such denial.

H. Freedom of thought, conscience and religion

45. The Human Rights Committee has emphasized that, under article 4 of the Covenant, the right to freedom of thought, conscience and religion is non-derogable. The Committee has underlined that States are obligated, particularly in the aftermath of the catastrophic events of 11 September 2001, to take necessary steps to prevent offences motivated by religious hatred, and to ensure that all persons are protected from discrimination on account of their religious beliefs.

I. Freedom of expression and assembly

46. Counter-terrorism measures may in certain cases result in limitations on the right to freedom of expression and assembly. Under the International Covenant on Civil and Political Rights, States may derogate from this freedom in time of emergency that threatens the life of the nation, provided they follow specific requirements relating to the declaration of emergency. They may also impose certain

limitations in the absence of an emergency, but, as stated in article 19, paragraph 3 of the Covenant, only as "provided by law and ... necessary for respect of the rights or reputations of others [or] for the protection of national security or of public order (ordre public), or of public health or morals." The Human Rights Committee has stressed that any limitations must be justified by specifying the precise nature of the threat posed by full exercise of this right.[21]

J. Freedom from discrimination

47. Several United Nations human rights mechanisms, including the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, have stressed that counter-terrorism measures must not infringe on the prohibition of discrimination on grounds of race, colour, sex, religion, political opinion, national origin or similar grounds.[22] The Committee on the Elimination of Racial Discrimination, for example, referring to measures that single out members of particular groups, has underlined the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin".[23] The Committee on the Elimination of Racial Discrimination and the Human Rights Committee have both expressed concern over cases of widespread harassment of persons of particular backgrounds, as well as the use of racial profiling.[24]

48. In a special report submitted to the Commission on Human Rights at its fifty-ninth session, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance called attention to "the grave situation of Muslims and Arabs in non-Muslim countries, which is a direct, proven and recognized consequence of the events of 11 September".[25] He recommended that the Commission, as a matter of urgency, encourage all States "to take preventive measures to guarantee the full and unfettered exercise of ... religious and cultural rights, ... to protect detainees from arbitrariness and prolonged imprisonment and to guarantee the protection of fundamental rights such as the rights to equality before the law, personal integrity and a fair trial".[26]

K. Treatment of non-nationals, including asylum-seekers

49. The Office of the United Nations High Commissioner for Refugees (UNHCR) has expressed concern over attempts to create unwarranted linkages between refugees and terrorism and to erode the right to seek and enjoy asylum from persecution. UNHCR has noted that a number of States have reviewed their asylum systems from a security perspective, tightening some procedures and introducing substantial modifications, for example, by broadening security grounds for detention or reviewing claims for the purpose of detecting potential security risks. According to UNHCR, although international refugee instruments do not provide for safe haven for terrorists and do not protect them from criminal prosecution, it has been notable since 11 September 2001 that in some instances, provisions of the 1951 Convention relating to the Status of Refugees have been broadened, allowing refugees to be excluded from status or expelled. In some countries, the formal incorporation of exclusion clauses into national legislation for the first time was a welcome development. Nevertheless, given its complexity, UNHCR has urged that

consideration of exclusion take place in regular asylum procedures or in the context of specialized units, rather than at the admissibility stage or in accelerated procedures.

50. Concerning steps taken by international organizations to adopt instruments to combat terrorism, UNHCR has promoted the inclusion of precise definitions and avoidance of unwarranted linkages between asylum-seekers and refugees, on the one hand, and terrorists. If definitions are too broad and vague, there is a risk that the "terrorist" label might be abused for political ends — for example, to penalize legitimate activities of political activists, in a manner amounting to persecution.

51. The Human Rights Committee has expressed particular concern over situations in which foreigners suspected of terrorism have been expelled by States without having an opportunity to make a legal challenge to such decisions.[27] The Committee has also called attention to possible violations of the principle of non-refoulement, which places an absolute prohibition on the removal of a person back to a country where substantial grounds exist to fear that he or she may be subject to serious human rights violations, such as torture.[28]

L. States of emergency

52. Finally, it should be noted that United Nations human rights mechanisms have frequently expressed concern over the use of provisions in international instruments for formal declarations of states of emergency, under which certain rights may be derogated from, provided, however, that strict conditions are met.[29] Article 4, paragraph 1, of the International Covenant on Civil and Political Rights provides that "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, ... States parties ... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." The article goes on to specify, in paragraph 2, certain fundamental rights from which, even in time of public emergency, no derogation is ever permitted.

53. The Human Rights Committee has expressed concern over various aspects of the use of these provisions. For example, it has cited cases where the life and existence of the nation may not be threatened[30] and where states of emergency have been left in place for many years without adequate justification.[31] It has noted situations in which states of emergency are imprecisely defined in law, possibly leading to unjustified restriction of rights.[32] It has also expressed concern over instances in which a state of emergency, with its attendant protective provisions, has not been formally or properly declared.[33] The Human Rights Committee addressed the overall question of human rights and states of emergency in detail, in its General Comment No. 29 (CCPR/C/21/Rev.1/Add.11), dated 31 August 2001.

VI. Conclusions

54. **The struggle against terrorism remains one of the most urgent challenges facing the international community. As attacks this year in a number of**

countries have confirmed yet again, terrorism devastates the human rights of those it targets, crippling their ability to realize their potential as human beings and threatening the development of societies based on democratic principles, rule of law and respect for human rights, including economic and social rights. International cooperation remains an essential component of an effective counter-terrorism strategy, and the United Nations has an important role to play in this regard.

55. While there is no doubt as to the legitimacy and urgency of the need for States to take resolute action against terrorism, United Nations human rights experts have stressed that human rights have come under significant pressure worldwide as a result of counter-terrorism measures, at both the national and the international level. Concerns have been raised over pressures on a wide range of rights, including the rights to life and to freedom from torture, due-process rights and the right to seek asylum. Yet respect for human rights should be seen as an essential part of an effective counter-terrorism strategy, not an impediment to it. We do no service to our greater goal of achieving international peace and security if we acquiesce in the sacrifice of human rights in our efforts to eradicate terrorism.

56. As the Secretary-General stated recently, at the fifth high-level meeting between the United Nations and regional organizations:

> "Every time we advance the protection of human rights, we deal a blow to the evil designs of terrorists, and we remove a sense of injustice which can cause the oppressed to channel their frustration into illegitimate violence. If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own. If we build on these fundamentals, I believe we can develop a new vision of global security: a vision that respects human rights while confronting the threats of our age — including the threat of terrorism."[34]

57. Regional organizations have reiterated their commitment that human rights should not be undermined in counter-terrorism efforts. At the fifth high-level meeting between the United Nations and regional organizations, participants expressed the need to uphold and ensure compliance with fundamental human rights and existing international human rights obligations as an integral part of the fight against terrorism, noting that respect for human rights — rather than a trade-off between human rights and security — constitutes a basic element in ensuring security.[35]

58. United Nations human rights treaty bodies and special procedures are paying close attention to this issue, and their conclusions and recommendations deserve wide consideration. The exchange of views that has taken place between United Nations human rights bodies, in particular the Human Rights Committee, and the Counter-Terrorism Committee of the Security Council has been a welcome development.

59. The Office of the United Nations High Commissioner for Human Rights has compiled a digest of universal and regional jurisprudence on the question of protecting human rights while countering terrorism. The digest offers useful guidance to Governments, legal practitioners, human rights defenders and

others on a solid human rights foundation for effective action against terrorism.

60. **States should consider availing themselves of the technical assistance available to help them in fully integrating human rights protections into measures taken against terrorism. Both the Office of the United Nations High Commissioner for Human Rights and regional organizations have notified the Counter-Terrorism Committee of their willingness to provide this kind of assistance.**

Notes

[1] See press release SG/SM/8624-SC/7680.

[2] Available on the Committee web site, http://www.un.org/Docs/sc/committees/1373/sel_docs.html.

[3] See A/AC.96/965.

[4] See CCPR/C/79/Add.54; see also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (OEA/Ser.L/V/II.116, doc.5, rev.1, corr.22) paras. 87 and 89: "[I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing, may use lethal force in certain situations ... The means that can be used by the state while protecting its security or that of its citizens are not unlimited, however. To the contrary, as specified by the [Inter-American Court on Human Rights], 'regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends.'"

[5] See CCPR/C/21/Rev.1/Add.11.

[6] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 44* (A/51/44), para. 211.

[7] E/CN.4/2002/137, para. 15.

[8] A/57/173, para. 5.

[9] See CCPR/C/21/Rev.1/Add.11, para. 13.

[10] CCPR/C/79/Add.23, para. 8.

[11] See CCPR/C/21/Rev.1/Add.11, para. 16.

[12] See HRI/GEN/1/Rev.6, chap. II, General Comment No. 8, para. 4.

[13] See CCPR/C/79/Add.56 and 81 and 93.

[14] HRI/GEN/1/Rev.6, chap. II, General Comment No. 8, para. 3.

[15] See Annual Report of the Inter-American Commission on Human Rights 1997, Case 11.205, Report No. 2/97, *Bronstein case* and Annual Report of the Inter-American Commission on Human Rights 1995, Case 11.245, Report No. 12/96, *Gimenez case*.

[16] See HRI/GEN/1/Rev.6, chap. II, General Comment No. 20, para. 6, and CCPR/C/79/Add.61.

[17] See CCPR/C/21/Rev.1/Add.11 and HRI/GEN/1/Rev.6, chap. II, General Comment No. 13.

[18] See CCPR/C/79/Add.67 and 76.

[19] See CCPR/C/79/Add.78 and 79.

[20] See CCPR/C/79/Add.61 and 80.

[21] In case No. 574/94 (1998) and case No. 34/1978 (1981).

[22] See, e.g., International Covenant on Civil and Political Rights, article 26.

[23] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18* (A/57/18), chap. XI.C, para. 5.

[24] See CERD/C/60/CO/5, CERD/C/60/CO/9 and CERD/C/62/CO/7.

[25] E/CN.4/2003/23, summary, third para.

[26] Ibid., para. 57.

[27] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. I, para. 83 (18).

[28] See CCPR/C/79/Add.105 (1999).

[29] See CCPR/C/21/Rev.1/Add.11.

[30] See CCPR/C/79/Add.76.

[31] See CCPR/C/79/Add.81 and 93.

[32] See CCPR/C/79/Add.78 and 90.

[33] See CCPR/C/79/Add.54 and 78 and 109.

[34] See press release SG/SM/8798.

[35] See press release SG/2084.